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No. 97-1642

In The

Supreme Court of the United States

October Term, 1998

United States Department of the Army,

Petitioner,

v.

Blue Fox, Inc.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The question presented is:

Whether a party may file a claim founded on a contract, seeking relief other than money damages, in district court under the Administrative Procedure Act, 5 U.S.C. § 702 (1994), or whether the Tucker Act, 28 U.S.C. § 1491(a)(1) expressly or impliedly forbids such actions.

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BRIEF *AMICUS CURAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] The Chamber represents an underlying

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for either party authored any part of this brief and that no one other than *amicus curiae*, its

(Footnote continued on next page)

membership of more than three million businesses and organizations of every size, sector and region, many of which contract with the Federal Government. The Chamber regularly advocates its members' views in court on issues of national concern to the business community.

This Court has long recognized that, when the United States contracts with private companies, the relationship between the parties should be the same as when private companies contract with each other. *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) (Souter, J., for the plurality) ("'When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'") (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)). The ability to obtain relief other than money damages in cases involving contracts is a cornerstone of contractual relations between private parties.

Likewise, the ability to obtain relief other than money damages for claims founded upon contracts with the Government is of great importance to the huge community that "does business" with the government on a daily basis. Most of that community are members of the Chamber. Because the jurisdictional issues in this case will significantly affect the rights of companies which contract with the Federal Government to seek relief other than money

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members, or its counsel provided any financial support for the preparation of the brief.

Pursuant to Supreme Court Rule 37.3, written consent to the filing of this brief has been obtained from counsel for petitioners and respondents, and the documents reflecting consent have been filed with the Clerk's office.

damages in contract cases, the Chamber has a vital interest in presenting its views on this subject to the Court.

SUMMARY OF ARGUMENT

This case involves the interplay of the waivers of sovereign immunity conferred by the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (1994), and the Tucker Act, 28 U.S.C. § 1491(a)(1). In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Court held that claims seeking money damages were subject to the Tucker Act waiver of sovereign immunity, while claims seeking other than money damages were subject to the APA's waiver of sovereign immunity.

Bowen's holding was based on the broad waiver of immunity effected by the 1976 amendments to the APA. Those amendments waived sovereign immunity for claims "seeking relief other than money damages . . . ." 5 U.S.C. § 702. The legislative history of those amendments reveals that Congress intended to "eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful action by an agency or by an officer or employee of the agency." H.R. Rep. No. 94-1656, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6123. *See also* S. Rep. No. 94-996, at 2 (1976) ("S. 800 would eliminate the defense of sovereign immunity in Federal court actions for specific relief claiming unlawful action by a Federal agency, officer, or employee.").

Petitioner does not challenge any of the holdings of *Bowen*. Rather, Petitioner urges the Court to refuse to extend the *Bowen* analysis to contract cases. In so doing, Petitioner seeks to impose an artificial limit on the broad waiver of sovereign immunity effected by the APA, by urging the Court to hold that sovereign immunity bars all claims

founded on contract except claims for money damages under the Tucker Act.

The APA's waiver of sovereign immunity does not exclude actions founded on contract. *Bowen* involved a claim founded upon statute. Recently, this Court has applied the *Bowen* framework to claims founded on the Constitution. *See Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, ___ U.S. ___ (1998). There is no basis in the Tucker Act or the APA to distinguish claims founded upon contract from claims founded upon statute or the Constitution.

The time has come for the Court to make clear that the *Bowen* framework applies to claims founded upon contract, just as the Court has applied it to claims founded upon the Constitution and statute. Such clarity will be consistent with the Court's holdings, the APA and the Tucker Act, and will minimize the need for courts to engage in the wasteful exercise of deciding which court should decide the merits of a case.

ARGUMENT

I. THE COURT SHOULD CLARIFY THE REACH OF *BOWEN V. MASSACHUSETS* IN LIGHT OF THE CONFUSION AMONG THE CIRCUITS REGARDING THE JURISDICTION OF DISTRICT COURTS TO DECIDE CONTRACT-RELATED CASES

A. *Bowen v. Massachusetts* Set The Framework For Analyzing Whether An Action Properly Belongs In The District Courts Under The APA Or In The Court of Federal Claims Court Under The Tucker Act

This Court last considered the interplay between the waivers of sovereign immunity conferred by the APA and the Tucker Act in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). In *Bowen* the State of Massachusetts sued the department of Health and Human Services ("HHS") in district court under the APA, challenging HHS' final order refusing to reimburse the State for a category of expenditures under the State's Medicaid program. 487 U.S. at 882. The State alleged that the order violated the Social Security Act and the HHS regulations implementing the Medicaid program, and requested declaratory and injunctive relief requiring HHS to make the reimbursement. *Id.* at 883-88.

The State argued that the district court had authority to grant complete relief under the APA.[2] 5 U.S.C. § 702.

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[2] For claims permitted under the APA waiver of sovereign immunity, jurisdiction is proper in the federal district courts under the federal question statute, 28 U.S.C. § 1331, the declaratory judgment statute, 28 U.S.C. §§ 2201-2202, or the

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The United States argued that the APA did not authorize review because (1) the State sought "money damages" which cannot be recovered under § 702 of the APA;[3] and (2) § 704 of the APA bars relief because the State had an adequate remedy at law, a suit for damages in the Claims Court under the Tucker Act. In essence, the United States contended that the only permissible suit the State could bring was a suit for money damages under the Tucker Act, 28 U.S.C. § 1491(a)(1).

This Court rejected the government's arguments. The Court recognized that payments of money do not always equate to "money damages," and held that a suit in equity to enforce a payment obligation was not a suit for "money damages" excepted from the APA. The Court also recognized that the money damages available in the Claims Court are not always "an adequate substitute" for equitable relief. *Bowen*, 487 U.S. at 905.

Bowen thus recognized that those adversely affected by government action may seek equitable relief and established a framework for analyzing whether an action properly belonged in the district courts under the APA, or in

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mandamus statute, 28 U.S.C. § 1361. *See, e.g., Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986).

[3] Petitioner here also argues that respondent is seeking money damages, and that for this reason the APA waiver of sovereign immunity does not apply. Respondent's action, however, seeks an equitable lien on appropriated funds that have already been obligated to pay for the work respondent performed as a subcontractor to Verdan Technology, Inc. Therefore, on its face, the action is not seeking money damages.

the Claims Court (subsequently renamed the Court of Federal Claims[4]) under the Tucker Act. Consistent with the language of the APA and the Tucker Act, the Court focused on the nature of relief sought by the plaintiff. For actions seeking relief other than money damages, the APA waived sovereign immunity and the action could be brought in district court. For actions seeking money damages, the Tucker Act waived sovereign immunity and the action could be brought in the Claims Court (or, if for $10,000 or less, in district court). 487 U.S. at 893-901.

B. The Courts Of Appeals Have Been Tentative In Applying The *Bowen* Framework To The Three Categories Of Claims Covered By The Tucker Act

Bowen was part of a continuing process by which the Court and Congress have reduced the applicability of the defense of sovereign immunity. *See, e.g.*, S. Rep. No. 94-996, at 3-4 ("Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens.").[5] This Court has

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[4] Pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), the United States Claims Court became the successor to the Court of Claims. Subsequently, pursuant to Title IX of the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992), the United States Claims Court was renamed the United States Court of Federal Claims.

[5] As discussed more fully below, S. Rep. No. 94-996 accompanied the bill that became the 1976 amendments to the APA.

now applied the *Bowen* framework to claims founded upon the Constitution, *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, ___ U.S. ___ (1998), and upon statute. *Bowen v. Massachusetts*, 487 U.S. 879. In both types of cases, this Court has held that a party may seek relief other than money damages in district court under the APA.

The same framework should be applied to cases seeking to enforce rights founded on contracts, which is the third category of claims covered by the Tucker Act. The courts of appeals, however, have been tentative in applying the *Bowen* framework to claims founded on contracts. The United States Court of Appeals for the Federal Circuit has applied this Court's decision in *Bowen* to cases involving contracts with the Federal Government, and has held that, where a claimant seeks relief other than money damages, an action against the Federal Government may lie in the district courts even when the actions are related to or involve a contract. *See, e.g., National Ctr. for Mfg. Sciences v. United States*, 114 F.3d 196 (Fed. Cir. 1997); *Katz v. Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994).

In contrast, the Courts of Appeals for the D.C. and Ninth Circuits have declined to apply *Bowen* to contract cases. Both courts have said that the reasoning of *Bowen* virtually compelled the conclusion that contract actions for other than money damages may be brought under the APA. *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992); *North Star Alaska v. United States*, 14 F.3d 36 (9th Cir. 1994). Because *Bowen* (in their view) did not involve a contract, however, both courts declined to so rule "[w]ithout more certain direction from the Supreme Court." *Transohio*, 967 F.2d at 613; *North Star Alaska*, 14 F.3d at 38.

Petitioner has sought to capitalize on the confusion among the courts of appeals by attempting to transfer cases to

the court most likely to dismiss them. In *National Center for Manufacturing Sciences*, the plaintiff filed suit in district court under the APA seeking an order directing the Air Force to release funds appropriated for a cooperative agreement between the plaintiff and the government. 114 F.3d at 198. The district court, however, found that the claim was a contract claim against the government in excess of $10,000, and transferred the case to the Court of Federal Claims. *Id.* The plaintiff filed an interlocutory appeal to the Federal Circuit. *Id.*

During the appeal, the government candidly acknowledged that its strategy was to have the case transferred to the Court of Federal Claims, and then to seek dismissal of the complaint on the grounds that the Appropriations Act was not a money-mandating statute, which, in turn, would require the plaintiff to "return to district court and start all over . . . by filing a new complaint, this time avoiding any suggestion in its complaint that the Appropriations Act is a money-mandating statute." *Id.* at 199. The court decried this situation, noting that "[t]his proposed scenario threatens to turn this case into a jurisprudential Flying Dutchman, casting about in search of a court that can reach the merits of [the plaintiff's] claims." *Id.*

Clarity in understanding where a case should be heard would avoid the "Flying Dutchman" scenario. *Id.* Moreover, clear guidance on jurisdictional questions such as those presented in this case will minimize the need for courts to "engage in the wasteful exercise of deciding not how a dispute should be resolved, but what court should be responsible for resolving it." *Id.* at 197, citing *Bowen*, 487 U.S. at 930 ("[n]othing is more wasteful than litigation about where to litigate, especially when all the options are courts within the same legal system that will apply the same law.") (Scalia, J., dissenting).

Only this Court can provide that clarity. Petitioner seeks to undermine the Court's recognition in *Bowen* of the broad waiver of sovereign immunity effected by the 1976 amendments to the APA by imposing a vestigial element of sovereign immunity that does not exist. Petitioner seeks to bar actions for other than money damages that are related in any way to contracts. The Court should provide a clear statement that, pursuant to the Court's reasoning in *Bowen*, the APA waiver of sovereign immunity does not exclude actions founded on contracts. To the extent that the Court of Appeals for the Ninth Circuit held that Respondent could bring this suit even though it related to a contract, the Chamber urges the Court to affirm the Ninth Circuit's decision.

II. THE 1976 AMENDMENTS TO THE APA WAIVED SOVEREIGN IMMUNITY FOR ALL CLAIMS SEEKING RELIEF OTHER THAN MONEY DAMAGES

The 1976 amendments to the APA were intended to effect a broad waiver of sovereign immunity for all claims seeking relief other than money damages. Before the 1976 amendments, section 702 of the APA provided only that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Pub. L. No. 89-554, 80 Stat. 392 (1966). The 1976 amendments added, *inter alia*, the following sentence to section 702:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color or legal authority shall not be dismissed nor relief

> therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Pub. L. No. 94-574, 90 Stat. 2721 (1976). The plain language of this addition states that the APA waives sovereign immunity for all actions seeking relief "other than money damages." No distinction relating to contracts is stated or even implied.

The legislative history of the 1976 amendments reveals that the purpose of those amendments was to eliminate the defense of sovereign immunity in all cases seeking relief other than money damages. For example, the House Report which accompanied S. 800 (the bill that became the 1976 amendments) stated that Congress intended to "eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency." H.R. Rep. No. 94-1656, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6123. The Senate report accompanying S. 800 contained a similar statement. *See* S. Rep. No. 94-996, at 2 (1976) ("S. 800 would eliminate the defense of sovereign immunity in Federal court actions for specific relief claiming unlawful action by a Federal agency, officer, or employee.").

Similarly, both the House and Senate reports stated that "the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." H.R. Rep. No. 94-1656, at 9, *supra*; S. Rep. No. 94-996, at 2. The Senate Report explained that elimination of the doctrine of sovereign immunity in suits seeking relief other than money damages was a necessary reform to

eliminate an obsolete concept and to strengthen the accountability of the Federal Government to its citizens:

> The doctrine of sovereign immunity probably descended from the tenet of medieval English law that the "King can do no wrong." Yet even today, 200 years after the American revolution, the doctrine stands as barrier to the redress of just grievances against the United States Government. *To the extent that this obsolete immunity doctrine prevents the orderly, rational review of actions of Federal officers, it is inconsistent with the principles of accountable and responsible Government.*
>
> Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens . . . . *S. 800 would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus.*

S. Rep. No. 94-996, at 3-4 (emphasis added). *See also* H.R. Rep. No. 94-1656, at 4, *supra*.

In *Bowen*, the Court recognized the broad waiver of sovereign immunity effected by the 1976 amendments to the APA. The Court noted that "it is undisputed that the 1976 amendment to § 702 was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment . . . ." *Id.* at 891-92. Further, the Court noted that the 1976 amendment "was unquestionably intended to

broaden the coverage of § 702 [of the APA]." *Id.* at 896. This waiver does not exclude actions founded on contracts from its reach.

III. THE TUCKER ACT DOES NOT EXCLUDE CLAIMS BASED ON CONTRACT FROM THE WAIVER OF SOVEREIGN IMMUNITY EFFECTED BY THE APA

Petitioner does not challenge any of the holdings in *Bowen*. Instead, Petitioner argues that *Bowen* should not be extended to claims founded on contracts. In order to accept Petitioner's argument, this Court would have to accept two premises. First, the Court would have to agree that under contracts, as distinct from the Constitution and statutes, money damages are always an adequate remedy at law. Second, the Court would have to agree that the Tucker Act impliedly forbids equitable relief based on contract rights. Neither premise is supported by precedent. Accordingly, *Bowen* should be extended to claims founded on contracts.

A. Money Damages Often Do Not Provide An Adequate Remedy For Contract Rights

The APA's broad waiver of sovereign immunity extends only to claims "for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704. Petitioner's argument that the APA waiver of sovereign immunity excludes claims based on contracts presumes that money damages always constitute adequate relief for an adverse ef[illegible] on contract rights.

Bowen addressed the adequacy of money damages in the context of a statutory requirement to pay money. *Bowen* 487 U.S. at 901. The Court rejected the Government's argument that section 704 would "bar review of the agency action in the District Court because monetary relief against

the United States is available in the Claims Court under the Tucker Act" as "restrictive" and "unprecedented." *Id.* at 904-05. Because of the "limited relief available in the Claims Court," *id.* at 901, namely that the Claims Court did not have the general equitable powers of a district court, the Court in *Bowen* was unwilling to conclude that "a naked money judgment against the United States will always be an adequate substitute for prospective relief . . . ." *Id.* at 905.

Although *Bowen* involved a statutory scheme, its reasoning applies equally well to an effort to enforce contract rights. *See National Ctr. for Mfg. Sciences,* 114 F.3d at 200-01 (because the Court of Federal Claims could not provide the equitable relief the plaintiff sought, there was no adequate remedy under the Tucker Act); *Transohio Sav. Bank,* 967 F.2d at 608, citing *Bowen* (a money judgment will not always be an adequate substitute for equitable relief). Because of the limited relief available in the Court of Federal Claims, a naked money judgment will not always be an adequate substitute for prospective relief when the government fails to perform its contractual obligations.

It is well-recognized at common law that money damages are not always an adequate remedy for contract-related actions. *See, e.g., Restatement (Second) of Contracts* § 357, 359, 360 (1981) (describing availability of specific performance and injunctive relief for contract actions when damages would not be adequate); U.C.C. § 2-716 (1989) (describing buyer's right to specific performance); *City Stores Co. v. Ammerman*, 266 F. Supp. 766, 776 (D.D.C. 1967) (specific performance of lease appropriate where legal remedies inadequate), *aff'd* 394 F.2d 950 (D.C. Cir. 1968); *Kroblin Refrigerated Xpress, Inc. v. Pitterich*, 805 F.2d 96, 103 (3rd Cir. 1986) ("Specific performance may be granted by a court of equity in its discretion if there is no adequate remedy at law."); *Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.*, 832 F.2d 214, 223-24 (1st Cir.

1987) (citing *Restatement (Second) of Contracts* § 360 and drawing analogy to U.C.C. § 2-716.)

Accordingly, there is no presumption in the law that money damages are always an adequate remedy for violations of contract rights. To the contrary, under common law and the Uniform Commercial Code, equitable relief for violations of contract rights is available. Similarly, money damages are not necessarily an adequate remedy when the Federal Government violates contract rights.

B. The Tucker Act Does Not Impliedly Forbid A Party From Obtaining Relief Other Than Money Damages Under The Tucker Act For A Claim Founded Upon A Contract

The second prong of the Government's argument is that the Tucker Act impliedly forbids the relief sought by Respondent. The APA states that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Petitioner argues that the Tucker Act is such a statute.

Petitioner's argument is based solely on the limitations on the authority of the Court of Federal Claims to grant other than money damages in cases filed under the Tucker Act. Br. for Petitioner at 47-49. The Court of Federal Claims' lack of authority to grant equitable relief should not effect the scope of the waiver of sovereign immunity under the APA.

Both the House and Senate reports that accompanied the 1976 amendments to the APA state that the "impliedly forbids" language "merely provides that new authority to grant specific relief is not conferred when Congress has dealt in particularity with a claim and intended a specified remedy

to be the exclusive remedy." S. Rep. No. 94-996, at 12; H.R. Rep. No. 94-1656, at 13, *supra* (same). The question that must be addressed, therefore, is whether the Tucker Act was intended to establish money damages as the exclusive remedy for claims founded on a contract. As the *Bowen* Court stated, the answer is no.[6]

First, the Tucker Act says nothing about the remedies available to a plaintiff. *See* 28 U.S.C. § 1491(a)(1). The restriction to obtaining money damages is derived from the limited authority of the Court of Federal Claims, which cannot grant equitable relief. *See Transohio Sav. Bank*, 967 F.2d at 608, citing *Richardson v. Morris*, 409 U.S. 464, 465 (1973); *United States v. Jones*, 131 U.S. 1 (1889).

Second, in *Bowen* the Court rejected the view that, under the Tucker Act, the Claims Court had exclusive jurisdiction to provide monetary relief. The Court said that the assumption that the Claims Court had such exclusive jurisdiction

> is not based on any language in the Tucker Act granting such exclusive jurisdiction to the

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[6] The legislative history of the 1976 amendments to the APA reveals that the drafters of those amendments did not assume that the Tucker Act imposed any limits on the ability of a plaintiff to seek relief other than money damages under the APA for claims founded on contract. Both the House and Senate reports state that "the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, *if any*, derived from statutes dealing with such matters as government contracts . . . ." S. Rep. No. 94-996, at 12 (emphasis added); H.R. Rep. No. 94-1656, at 13, *supra* (same).

> Claims Court. Rather, that court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear claims that may be decided by the Claims Court. If, however, § 702 of the APA is construed to authorize a district court to grant monetary relief-other than traditional "money damages"—as an incident to the complete relief that is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not sufficient reason to bar that aspect of the relief available in a district court.

487 U.S. at 910 n.48.

In other words, the Court said in *Bowen* that the Tucker Act did not forbid a party from obtaining relief in the form of payment of money from the government as an incident to other relief ordered by a district court under the APA. It stands to reason, therefore, that the Tucker Act does not forbid obtaining relief *other* than the payment of money under the APA -- that is precisely the purpose of the 1976 amendments to the APA.

Third, allowing actions for claims founded on contract under the APA is consistent with the purpose of the Tucker Act. The Court of Appeals for the D.C. Circuit has stated that a primary purpose of the Tucker Act is "to ensure that a central judicial body adjudicates most claims against the United States Treasury," *Kidwell v. Army*, 56 F.3d 279, 284 (D.C. Cir. 1995), citing *United States v. Hohri*, 482 U.S. 64, 71-73 (1987) (describing goal of uniformity behind creation of Federal Circuit); *Vietnam Veterans of America v. Secretary of the Navy*, 843 F.2d 528, 534 (D.C. Cir. 1988) (recognizing Tucker Act's interest in uniformity). Even if

actions founded on contracts seeking relief other than money damages may be brought under the APA, most claims against the United States Treasury (i.e., claims for money damages) still would be resolved by a central judicial body -- the Court of Federal Claims under the Tucker Act. In those cases where a money damages remedy under the Tucker Act would be adequate, an action under the APA would not lie. *See* 5 U.S.C. § 704.[7]

Finally, in *Bowen* the Court cited an action founded on contract as one example of an action that would lie under the APA. The Court quoted extensively from Judge Bork's discussion of the purpose of the 1976 amendment to the APA in *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441 (D.C. Cir. 1985). *Bowen*, 487 U.S. at 899 ("Judge Bork's summary of the legislative history is especially convincing."). In particular, the Court cited Judge Bork's discussion of the distinction between claims for money damages (covered by the Tucker Act) and claims for other relief (permitted under the APA). *Id.* at 899-900.

Judge Bork noted that a plaintiff might file an equitable action seeking specific relief that would nonetheless result in the payment of money by the United States to the plaintiff. *Maryland Dep't of Human Resources*, 763 F.2d at 1446. In such cases, because the relief sought would not be money damages, but specific relief, the APA would waive sovereign immunity over a plaintiff's suit. *Id.*

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[7] While an adequate remedy at law may exist in many cases, as noted above, money damages is not always an adequate remedy. Whether money damages would be adequate must be addressed on a case-by-case basis. It cannot be predetermined for all cases involving contract rights.

To illustrate this distinction, Judge Bork noted that "while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.' *Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms.*" *Maryland Dep't of Human Resources*, 763 F.2d at 1446, quoting D. Dobbs, *Handbook on the Law of Remedies*, 135 (1973) (emphasis added). The Court in *Bowen* quoted this portion of Judge Bork's decision. *See Bowen*, 487 U.S. at 895.

Judge Bork's example involved an action founded on contract in which the relief included the payment of money (though not money damages). The Court accepted that situation as an example of an action that would lie under the APA. Clearly, therefore, where a party seeks relief that does not even involve the payment of money, the action also would lie under the APA. Nothing in *Bowen* would suggest otherwise.

C. The *Bowen* Framework Should Apply To Claims Founded On Contract

1. This Court Has Applied The *Bowen* Framework To Claims Founded Upon The Constitution And Statute

The Tucker Act waives sovereign immunity for three categories of claims: claims founded upon the Constitution; claims founded upon law (statutes and regulations); and claims founded upon contracts. Nothing in the text of the Tucker Act suggests that claims founded upon contract should be treated any differently from claims founded on the Constitution, statutes, or regulations. 28 U.S.C. § 1491(a)(1). This Court already has determined that the APA waiver of sovereign immunity for suits founded on the Constitution or

statutes are unaffected by the Tucker Act. The rule should be the same for claims founded on contract.

In *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, ___ U.S. ___, the Court discussed the appropriate jurisdiction for claims founded upon the Fifth Amendment. As it did in *Bowen*, the Court held that the nature of the relief sought by the plaintiff determined whether the Tucker Act waiver of sovereign immunity or the APA waiver of sovereign immunity applied to such claims.

The plaintiff (Eastern) filed suit in district court seeking, *inter alia*, a declaratory judgment that assessments of premiums under the Coal Act constituted an illegal taking under the Fifth Amendment and violated the Due Process Clause. Because the Tucker Act confers jurisdiction over actions based upon the Constitution for money damages in excess of $10,000, the Court said that "a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance . . . ." 118 S. Ct. at 2144.

However, the Court noted that "Eastern does not seek compensation from the Government. Instead, Eastern requests a declaratory judgment that the Coal Act violates the Constitution and a corresponding injunction against . . . enforcement of the Act as to Eastern." 118 S. Ct. at 2144-45. Therefore, the Court concluded that the district court had jurisdiction over Eastern's claim pursuant to the APA. "Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the

circumstances, and that it is within the district courts' power to award such equitable relief." *Id.* at 2145-46.[8]

Similarly, in *Bowen*, the Court found that the claim, which was founded on statute, could be brought under the APA. The Court held that the Tucker Act did not impliedly forbid relief. There is no suggestion in the Tucker Act (or the APA) that claims founded on contract should be treated differently from claims founded on statute or the Constitution. Like Constitutional and statutory claims for money damages, contract claims for money damages are subject to the Tucker Act waiver of sovereign immunity. But like Constitutional and statutory claims for relief other than money damages, contract claims for relief other than money damages also should be subject to the APA waiver of sovereign immunity.

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[8] Lower courts also have applied the *Bowen* framework to claims founded on the Constitution. *See, e.g., Crane v. United States*, 41 Fed. Cl. 338 (1998) (suit alleging that plaintiff was separated from the Armed Services in violation of Fifth Amendment due process rights and seeking reinstatement was a claim for specific relief which lies under the APA and should be transferred to district court); *Osprey Pacific Corp. v. United States*, 41 Fed. Cl. 150 (1998) (claim for just compensation for taking under the Fifth Amendment properly brought in Court of Federal Claims under the Tucker Act).

2. The Analysis Of *Bowen* In The Courts Of Appeals Is Consistent With Applying The *Bowen* Framework To Claims Founded Upon Contract

The Federal Circuit has extended the *Bowen* decision to contract cases, by applying *Bowen*'s analysis to determine whether an action properly lies in the district courts under the APA or in the Court of Federal Claims under the Tucker Act. In short, the Federal Circuit approaches such cases by focusing on the nature of the relief sought, just as this Court did in *Bowen*. *National Ctr. for Mfg. Sciences,* 114 F.3d 196; *Katz v. Cisneros*, 16 F.3d 1204.

In contrast, both the D.C. Circuit and the Ninth Circuit have declined to extend the *Bowen* framework to actions founded on contract. But in so declining, both circuits have virtually begged for clear guidance from this Court. Moreover, their opinions demonstrate that the application of the *Bowen* framework to contract cases is appropriate.

The Court of Appeals for the D.C. Circuit addressed the issue in *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598. In *Transohio* the plaintiff filed suit in district court under the APA seeking an injunction to enjoin the United States from applying the capital requirements of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") to the plaintiff. Plaintiff alleged that imposing those requirements would violate the statute, violate plaintiff's substanti e due process rights, and constitute a breach of the plaintiff's contract with the United States. *Id.* at 603.

The D.C. Circuit, relying on its prior precedent, distinguished between contract claims and claims founded on the Constitution or a statute:

> The lesson of [our prior case law], we think is straightforward: under § 702 and the Tucker Act, litigants may bring common-law contract claims only as actions for money damages in the Claims Court, but they may bring statutory and constitutional claims for specific relief in federal district court.

Id. at 610. The court recognized, however, the right of a party to bring constitutional or statutory actions under the APA even if the relief requested was the equivalent of specific performance of the contract.

In distinguishing the contract claims, the court recognized that *Bowen* might require a review of the precedent on which the court relied for the distinction. The D.C. Circuit stated:

> *Bowen* suggests that courts may have been reading the Tucker Act too broadly and the APA too narrowly. . . .
>
> There is no hint in *Bowen* that the broad scope of the APA's sovereign-immunity waiver, or the nonexclusivity of Claims Court jurisdiction, varies according to whether the claim involves a contract. Indeed, language in *Bowen* seems to imply the contrary. . . .
>
> Transohio makes a strong case that, after *Bowen*, the Tucker Act should not be read to "impliedly forbid" under the APA the bringing in district court of contract actions for specific relief, that such a result would be faithful to the text of the Tucker Act and the APA, and sensible. Nothing in the language

> of either the Tucker Act or the APA requires special treatment for contract claims. . . .

Id. at 612.

Yet, despite its recognition that nothing in *Bowen* or the Tucker Act justified the court's prior distinction among the categories of claims covered by the Tucker Act, the D.C. Circuit refused to overrule its prior cases.

> *Bowen* did not involve a contract and it did not address the 'impliedly forbids' limitation on the APA's waiver of sovereign immunity. Without more certain direction from the Supreme Court, we decline to overrule this Court's very specific holdings that the APA does not waive sovereign immunity for contract claims seeking specific relief.

Id. at 613.

The Ninth Circuit reached a similar conclusion in *North Star Alaska v. United States*, 14 F.3d 36 (9th Cir. 1994). In that case, the court noted that *Bowen* "could be interpreted as taking a more expansive view of district court jurisdiction under the APA than we have previously recognized." *Id.* at 38. However, because *Bowen* did not involve a contract, the Ninth Circuit, like the D.C. Circuit, declined to overrule its prior case law holding that the APA does not waive sovereign immunity for contract claims seeking equitable relief, "'[w]ithout more certain direction from the Supreme Court.'" *Id.* (quoting *Transohio*, 967 F.2d at 613).

Though they refused to apply *Bowen* to claims founded on contracts, the analysis of *Bowen* in both the D.C. and Ninth Circuits is consistent with the Federal Circuit's

application of the *Bowen* framework to contract cases. It is the D.C. and Ninth Circuits' refusal to extend *Bowen* to contact cases that pointedly demonstrates the need for guidance from this Court. Without such guidance, plaintiffs will continue to face the "Flying Dutchman" scenario, and the courts will continue to engage in the wasteful exercise of deciding who should decide, notwithstanding their apparent understanding that *Bowen* dictates otherwise.

Accordingly, the time has come for this Court to eliminate the confusion. The time has come for this Court to state that the APA has eliminated all vestiges of the defense of sovereign immunity for claims against the United States. It is time for this Court to state that the waiver of sovereign immunity in the APA includes claims founded on contracts when they seek relief other than money damages.

CONCLUSION

For the foregoing reasons, the Court should rule that the APA waives sovereign immunity for all claims against the United States seeking relief other than money damages, even where the action involves a claim founded on a contract. Accordingly, to the extent that the decision below of the Ninth Circuit rests on such an interpretation of the APA and the Tucker Act, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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